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IN THE

Supreme Court of the United States

October Term, 1952.

No. 514.

LEROY J. LEISHMAN,
Petitioner,

vs.

GENERAL MOTORS CORPORATION,
Respondent.

PETITIONER'S REPLY BRIEF.

LEROY J. LEISHMAN,
in propria persona.

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PETITIONER'S REPLY BRIEF.

The situation which respondent urges as the chief basis for its contentions that certiorari should be denied, is the very situation that petitioner set forth in explaining his fourth reason why the writ should be granted. It was fully disclosed in the petition, the appendix and the brief that both appellate courts had held the patent invalid, but that both courts had done so upon different erroneous grounds and by unorthodox methods in conflict with those used and recommended by this Honorable Court in its applicable decisions. Respondent does not deny any of this, and no issue is taken with petitioner's well documented statements regarding the serious errors that misled the courts. Respondent's thesis is merely that the dual conclusions of invalidity leave no basis for certiorari. But when these conclusions are based upon different and equally untenable grounds that cannot be denied by respondent, the two opinions create a far more cogent reason for granting certiorari than a mere conflict could possibly do. Two wrongs do not make a right, but multiply injustice.

In a far less serious situation, this Honorable Court said:

> "It is urged, however, that concurrence of two courts below, in holding the patent claims valid, concludes this Court. A recent restatement of the 'two-court rule' reads, 'A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below *in the absence of a very obvious and exceptional showing of error.*'" (Emphasis added.) *The Great Atlantic and Pacific Tea Company* v. *Supermarket Equipment Corporation*, 340 U. S. 147, 153.

There has been in this case a most unusual showing of grave errors that are obvious when once pointed out, and it is significant that respondent does not deny any of them. Moreover, the findings of fact upon which the appellate courts respectively based their conclusions of law, are *not concurrent* and were made by the appellate courts themselves to rationalize or replace the findings made by the trial courts.

If one court of appeals holds a patent invalid upon untenable grounds, there may be reason to assume that the error will result in a future conflict between circuits and that consequently no injustice will follow if certiorari is denied in the first instance; but if two appellate courts hold the patent invalid upon untenable grounds, the cumulative error becomes intolerable and there is no way the injustice can be rectified excepting through the supervisory powers of this Honorable Court.

One of the chief things relied upon by the Court of Appeals for the Ninth Circuit in its holding of invalidity was certain carefully prepared direct testimony given by respondent's expert witness on direct examination. The appellate court said this testimony was reasonably credible, and that it could not therefore overrule the trial court.

But the petition stated (p. 12), and the supporting brief verified (p. 24 et seq.), that this testimony was controverted by the witness himself on cross-examination and that neither this witness nor his testimony was even mentioned in the lower court's opinion. Respondent's brief has of course entirely ignored petitioner's revelations of this serious error. When a litigant loses a case because of such a departure from proper practice upon the part of the appellate court itself, the litigant manifestly has no recourse excepting to this Honorable Supreme Court.

In stating in its decision in *The Great Atlantic and Pacific Tea Co.* v. *Supermarket Equipment Corporation*, 340 U. S. 147, 152, that the whole of a combination of old elements, in order to be patentable, must exceed the sum of its parts, this Honorable Court provided the lower courts with a yardstick for determining invention in combination patents that should go far toward removing the uncertainty that has filled the minds of many judges in the past, and petitioner's brief (pp. 19 to 23) showed that his combination would have fully met this test had it been applied.

This Honorable Court has made rather strong statements regarding another affirmative test for invention that is applicable in situations where skilled artisans have repeatedly failed to solve the problem effectively met by a combination in question. This rule, succinctly phrased in *Expanded Metal Co.* v. *Bradford*, 214 U. S. 366, 381, and cited in the petition on page 9, was clearly applicable to the instant patent, yet it was ignored by the courts of appeals for both the Ninth and Tenth circuits. Courts logically complain about the difficulty encountered by scientific laymen when required to determine, in retrospect, whether invention is present in a given combination, yet these two tests, both approved by this Honorable Court, are clearly within the ability of any of the lower courts to apply if the proper evidence is available, as it was in the instant case. One object of the Law is to establish uniformity in deci-

sions, but only chaos can result if the lower courts are permitted to set aside the Supreme Court's rules, as they have done here, and substitute as many different methods for determining invention as there are judges in the federal judiciary.

Most of the erroneous and needless engineering observations made and relied upon by the appellate courts in connection with the instant patent have been the direct result of their failure to follow the safe procedure approved by this Court in the aforementioned Bradford decision. Specific reference to some of these will show not only how the grant of certiorari in this case can remove thirteen years of injustice to the instant patentee, but how the whole tone of patent decisions can improve and future injustices be averted if this Honorable Court will avail itself of the present opportunity to insist upon the observance of its pertinent rules and adherence to proper judicial procedure.

It was stated in the petition (p. 12) and shown in the brief in support thereof (p. 31 et seq.) that the court of appeals in the instant case had made erroneous but controlling statements of fact that were controverted right in the opinion by testimony previously quoted with apparent approval. Either the court was very careless, or it did not understand what it was quoting. Had the court followed the test approved by this Honorable Supreme Court in the *Bradford* case, it could have avoided the needless consideration of ancillary engineering problems of unsuspectedly hidden complexity, and it could have stated with unassailable logic that since the Zenith Corporation and Marschalk and the Crosley Corporation and respondent General Motors Corporation had all failed to find a simple way to build an adjustable tappet tuner that would not "creep", that petitioner's completely satisfactory solution, which these corporations all adopted, was manifestly beyond mechanical skill.

Instead, the court went on unknowingly to compound its errors in the very next paragraph, thus (R. 1197):

> "• • • What appellant has done in effect (although there is no evidence of any conscious effort to that end), has been to tie together with cross-members the ends of the two lower arms or cross-bars of Schaefer, and to cut off the racks and pinions above the arms, and to insert rotatable shafts at the center of the new tie bars so that the arms or cross-bars on which the tappet operates will now rotate instead of move up and down. Here, as in the Schaefer device, creeping is avoided because of the attained equilibrium, the pressure on either side being continuously the same, and this is obtained, of course, through the coaxiality resulting from the modifications just described." (Parenthetical explanation by the court itself.)

The modifications described by the court do *not* result in coaxiality. If one were "to insert rotatable shafts at the center of the new tie bars", as the court says was done, the rocker thus formed would not be coaxial with the tappet and the tuner would "creep" just as Marschalk's did. Yet the court based its opinion upon the assumption that the described change would produce a coaxial structure. This needless and error-producing sojourn into an expert's proper field shows what can happen when a court ignores the aforementioned safe rules provided by this Honorable Court. If one were to add tie bars to Schaefer's cross-bars in order to produce a rocker to cooperate with his particular tappet, as described by the court, the axis of the rocker, if the device were to become coaxial, could not go through the center of the tie bars as the court wrongly assumes, but would have to lie on the top surface of the rocker in order to be coincident with the axis of Schaefer's tappet. The rocker and tappet must be especially shaped with respect

to each other with the idea of coaxiality definitely in mind, and coaxiality is not an inadvertent result.

In the Richards and Conover trial, the attorney and expert opposing the patent tried initially to convince the court that petitioner's structure would automatically result from a combination of Schaefer's tappet and Marschalk's rocker, but in order to arrive at an operative coaxial combination to demonstrate for the court, it was necessary to arrange the rocker's axis flush with the rocker's top surface. Many pages of testimony were devoted to Mr. Flam's and Judge Chandler's cross-examination of the witness regarding the obviousness or unobviousness of these additional steps required to achieve coaxiality in a combination such as the Court of Appeals for the Ninth Circuit has assumed would automatically embody this relationship without doing anything further. The witness who was opposing the patent in The Richards and Conover case was Dr. Spotts, Associate Professor of Machine Design at Northwestern University, and his concluding testimony as to whether he would expect his own students in machine design to arrive at coaxiality in such a structure was as follows (p. 38 of Richards and Conover record, filed herein by respondent):

> "A. I wouldn't expect many of them to try to lower the top surface of the plate to the center of the shaft merely from looking at the Marschalk drawings, and having no model to tell that.
>
> "Q. Then you would not expect them to arrive at this Model, Exhibit M?[1] A. Not to that degree, no."

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[1]Exhibit M was a model in which the coaxial relationship had been embodied by lowering the top surface of the rocker to the center of the shaft which the Court of Appeals for the Ninth Circuit erroneously thought would automatically produce a coaxial structure if placed in the *center* of the rocker where one would normally expect to place it.

But the Court of Appeals for the Ninth Circuit, in the last foregoing quotation from its opinion, held that no invention was involved in petitioner's combination because the court failed to perceive that this combination would not automatically result from its hypothetical alterations in Schaefer's mechanism; and the Court was totally oblivious to the necessity for such additional changes as Dr. Spotts thought were beyond the ability of his own engineering students. The point here is that such an error could not have occurred had not the court unnecessarily ventured into fields of scientific observation and speculation that are unsafe for "judges undisciplined in the craft and untutored in its inarticulate presuppositions", as the Court of Appeals for the Second Circuit phrased it in the following portion of its opinion in *Landis Machine Company et al.* v. *Parker-Kalon Corporation, et al.*, 190 F. 2d 543, 546:

> "* * * it scarcely needs more than the statement of the question to disclose the fatuity of asking judges, undisciplined in the craft and untutored in its inarticulate presuppositions, to say how far the innovation is beyond the powers of merely competent craftsmen. For that reason we have over and over again resorted to the history of what went before, the duration of the period during which the invention was needed but failed to appear and its acceptance when it did. These circumstances have seemed to us, not indeed an absolute determinant of invention, for there is none; but at least the best, and indeed almost always the only, rational approach to a solution."

This test is practically the same as that recommended by this Honorable Supreme Court in the aforementioned *Bradford* case when it said (214 U. S. 366, at 381):

> "* * * It may be safely said that if those skilled in the mechanical arts are working in a given field

> and have failed after repeated efforts to discover a certain new and useful improvement, that he who first makes the discovery has done more than make the obvious improvement which would suggest itself to a mechanic skilled in the art, and is entitled to protection as an inventor."

No error of any kind would have occurred had the Court of Appeals for the Ninth Circuit applied this dependable Supreme Court formula to the evidence in the instant case. The record showed that the Zenith Corporation had long sought a simpler tuner than its own Schaefer device. The appellate court itself mentioned the complexities of this device and Marschalk's unsuccessful efforts to improve it. The record shows that the Crosley Corporation also recognized the shortcomings in the Zenith-Schaefer tuner and had difficulty with its own research until after it asked its patent attorney to investigate petitioner's teachings. (See footnote 5, page 12 of the brief supporting the petition.) And with perhaps even greater significance, the record shows that the engineers of respondent General Motors Corporation were successful in making only a minor simplification in the Schaefer tuner, and that respondent discarded the results of its own research, adopted petitioner's simple structure, and filed this Declaratory Judgment action asking the court to hold that petitioner's contribution involved only mechanical skill. (See pp. 19 to 23 of the brief supporting the petition.)

If the anomalous and impossible position of respondent was not readily apparent to the appellate court, it would have been revealed by following this Honorable Supreme Court's applicable decisions.

The decisions of invalidity made by the Court of Appeals for the Tenth Circuit in *Leishman* v. *The Richards and Conover Company,* 172 F. 2d 365, were also based

upon erroneous technical assumptions that would not have been made had it followed the rule which this Honorable Court described as a "safe" one in its Bradford decision, supra. After finding that its first decision, as shown in the Appendix to the instant petition (App. 5 to 7) and supporting brief (Br. 3 and 4), was based upon a misconception of the purpose of the coaxial relationship in petitioner's combination, the Court of Appeals for the Tenth Circuit ventured upon an independent mathematical analysis of the reasons for creeping. Not only did the court base its second opinion upon the belief that this analysis was a correct and proper one, but it impressed and misled the district court in the instant case which was withholding its opinion for that of the Court of Appeals for the Tenth Circuit (see p. 7 of the Appendix to the present petition). The final opinion of the latter court after rehearing was reported along with the first. The purported mathematical analysis was pseudo-scientific in the extreme, as shown by the affidavits of the respective leading authorities in mechanical engineering at California Institute of Technology, University of Southern California, and University of California at Los Angeles (R. 71 to 83), yet this unnecessary invasion into an expert's domain became the basis for two decisions against the patent.

We cannot have two different orders of scientific truth in the United States: one in the universities, and another artificial and incompatible one in the courts. But this state of affairs would not exist if the lower courts adhered to this Honorable Court's proper standards for determining invention.

We are thus faced with a situation, undenied by respondent, that raises a serious question of great importance to the patent system, to the federal courts, and to industry in general. This question was presented in the petition (pp. 8 and 9 thereof) as the fourth which this Honorable Court should decide in the present case, but it is

by no means fourth in importance. Industry has largely been built upon unobvious technical advances resulting from research and experimentation, and when this work is carried on by a small concern or private party there is no possible reimbursement excepting the brief monopoly provided by the patent laws. A patent is the inventor's short term deed to the fruits of his labors. If the courts that safeguard these rights are not held to proper standards for determining invention, large entrenched interests can appropriate the results of the creative work of individuals and small concerns, forcing them out of business and destroying in such cases the initiative that is the leaven of our free enterprise system.

Respondent's brief misconstrues some of petitioner's statements with respect to the issue of infringement. Nowhere did petitioner state that the Court of Appeals for the Tenth Circuit held the patent infringed. On page 43 of his brief petitioner quoted from the decision of that court in *Leishman* v. *The Richards and Conover Company,* 172 F. 2d 365, 368, 369, and reference was also made to footnote 3 of that decision which left no possible doubt that that court would have held the patent infringed had not it made the grave errors with respect to validity that were referred to in the brief in support of the petition herein, and also in the Petition for a Writ of Certiorari and Supporting Brief in *The Richards and Conover* case, October Term, 1948, No. 612, and particularly in the Petition for Rehearing of Order on Petition for Writ of Certiorari therein. The lower court in that case held the patent valid and infringed, and Judge Harrison, in the first case involving this patent, held that petitioner's combination was included in tuners patentwise the same as those of respondent. (See page 41 of the brief accompanying the petition herein.) There is no evidence that any other court shares the views of the Court of Appeals for the Ninth Circuit that such a structure would not infringe the claims here at issue.

Respondent makes much of the fact that this Honorable Supreme Court denied certiorari in these other cases. This Court has many times stated that denial of certiorari is not to be construed as an approval of the decision sought to be reviewed, and respondent should know this.

There is one important thing, however, with respect to the denial of certiorari in these other cases that should be of interest to this Honorable Court at this time. The case of *Leishman* v. *Radio Condenser Company and General Instrument Corporation* (see pp. 15 to 19 of the petition herein) is again before the district court on a timely motion to reopen the case on the basis of new evidence. The ultimate decision herein will be controlling with respect to the final decision in that case. That case superseded the Tenth Circuit *Richards and Conover* case with regard to the tuners manufactured by Radio Condenser Company and General Instrument Corporation. The granting of certiorari herein will thus serve all the purposes that would have been served had certiorari been granted in these other actions. This Honorable Supreme Court thus has the opportunity of bringing about ultimate justice in all three cases through the grant of a writ of certiorari in this one action, which is earnestly requested.

Respectfully submitted,

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